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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 21

UNITED STATES OF AMERICA, EX REL. MURRAY BRENSILBER, AND EMANUEL THEBNER, AND MURRAY BRENSILBER AND EMANUEL THEBNER, ON THEIR OWN BEHALF, PETITIONERS

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH AND THEODORE B. DRESCHER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed because the case presents a question of public importance the decision of which will affect the right of the United States to recover damages and penalties under R. S. 3490–3493.

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 267–269) is reported in 131 F. (2d) 545.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 23, 1942 (R. 270). The petition for a writ of certiorari was filed February 23, 1943, and granted May 3, 1943. The jurisdiction of the Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a claim against the United States, based on a contract procured by one who had entered into an agreement with a competitor that only one would submit a bid to the United States, is fraudulent within the meaning of R. S. 5438, as incorporated in R. S. 3490–3493.

2. Whether a claim against the United States, based on the performance of a contract procured by one who had entered into an agreement with a competitor that only one should submit a bid to the United States unless quotations were directly sought from the other, and that the other would then submit an artificial bid in the form of a protective offer, is fraudulent within the meaning of the statutes.

STATUTES INVOLVED

The provisions of R. S. 5438 (12 Stat. 696) and R. S. 3490–3493 (12 Stat. 696; 31 U. S. C. 231–234) are set forth in the appendices to petitioners' and respondents' briefs.

STATEMENT OF FACTS

This action was brought in the District Court of the United States for the Southern District of New York, by petitioners Brensilber and Thebner, on behalf of the United States and in their own behalf, pursuant to R. S. 3490–3493, to recover damages and penalties allegedly due the United States by reason of respondents having submitted fraudulent claims to the United States (R. 3–10). On respondents' motions and on the basis of supporting and counter affidavits (R. 11–77, 249–253), the district court entered an order dismissing the complaint and granting summary judgment (R. 259–262). It also denied petitioners leave to file a proposed amended complaint (R. 78-85) on the ground that it did not state a cause of action (R. 254–258). The court below affirmed (R. 267–270).

Original Complaint.—The original complaint named as defendants Bausch & Lomb Optical Company, Carl Zeiss, Inc., M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher, and made the following allegations:

Both concerns were engaged in the manufacture of military optical instruments purchased by the United States (R. 3–4). During the period 1921–1940, the defendants (respondents herein) and other unknown persons were continuously engaged in an unlawful conspiracy to fix unreasonable and artifical prices on sales of military optical equipment to the United States Govern-

ment. The conspiracy was promoted by a written agreement entered into between the two concerns on April 28, 1921, and by supplements thereto of June 27 and October 28, 1925, and November 26 and December 24, 1926. In this conspiracy, each concern agreed not to fix prices without the consent of the other, and when quotations were made to include a mark-up of up to 20 percent over the regular price, such mark-up to be paid by the successful bidder to the other party to the agreement. (R. 5–6.) Pursuant to the conspiracy the two concerns at various times between 1921 and 1940 submitted bids to the United States for military optical equipment at prices pretended and represented to be normal and competitive, and believed to be so by the United States and its representatives, but which were actually about 20 percent higher than normal and competitive prices; and in ignorance of the conspiracy, the United States from time to time contracted for the purchase of military optical equipment on the basis of such bids, paying the prices quoted by respondents. (R. 6–8.) Under the contracts thus obtained, respondents submitted claims to the United States and received payment thereon, which were fraudulent by reason of the conspiracy and their inclusion of an arbitrary mark-up of 20 percent. Respondents thereby violated R. S. 3490–3494 (R. 8–9), causing damages to the United States in the sum of $20,000,000 (R. 9–10). The complaint prayed for

recovery of twice that amount, plus $2,000 for each transaction (R. 10).

Order to Show Cause of January 6, 1942, and Supporting Affidavits.—On January 6, 1942, the individual respondents and respondent Bausch & Lomb obtained an order directing petitioners to show cause on January 16, 1942, why the complaint should not be dismissed (a) for improper venue, (b) for failure to state a cause of action, and (c) why summary judgment should not be granted for respondents on the ground that the complaint and respondents' affidavits annexed to the order showed that there was no genuine issue of fact and that respondents were entitled to judgment as a matter of law (R. 12).[1]

The annexed affidavits challenged the truth of various allegations in the complaint regarding the conspiracy,[2] and recited that on March 26, 1940, an indictment "covering the same subject as is now covered by the complaint in this action" was returned against the same defendants, charging

[1] On the same day respondent Carl Zeiss, Inc., moved to dismiss the complaint as to it and for summary judgment (R. 39).

[2] In addition to generally denying "in fact" the commission of any fraud upon the United States, the affidavits stated that the antitrust pleadings showed that petitioners erred in alleging that the individual respondents were officers of Carl Zeiss, Inc. (R. 25), that the agreements in question were entered into with Carl Zeiss, Inc. (as distinct from Carl Zeiss of Jena, Germany) (R. 26), and that under the agreements Bausch & Lomb was required to add 20% to all bids which it made to the United States on military optical instruments (R. 26–27).

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alleged violations of the Sherman Antitrust Act, to which they pleaded *nolo contendere*. The indictment was incorporated by reference in the affidavits without conceding "the correctness of all of the charges made" therein. (R. 23.) The affidavits further incorporated by reference an equity complaint, brought by the United States against respondents on July 9, 1940, "covering the same matters charged in the indictment," the consent decree entered in the equity suit (R. 24), and also certain agreements annexed to the complaint in that suit, bearing the dates of the agreements referred to in the petitioners' complaint in the case at bar (R. 5, 26).

Antitrust Indictment and Complaint.—Both the antitrust indictment (R. 86–109) and the equity complaint (R. 212–227), each of which charged an unlawful conspiracy, in violation of the antitrust laws, to suppress competition and divide the world markets in the sale of military optical instruments during the years 1921–1940 (R. 93-94, 219–220), centered largely around the aforementioned agreements annexed to the equity complaint, entered into between respondent Bausch & Lomb and Carl Zeiss of Jena, Germany.[3] (These agreements appear in full at R. 228–242.)

[3] Both parties were described as manufacturers of military optical instruments (R. 87–88, 216–217). The indictment and complaint both recited that any alleged acts done by Zeiss meant acts done by Zeiss of Jena in its own name, or through the agency of Carl Zeiss, Inc., or Nedinsco (R. 90, 216), wholly owned subsidiaries of Zeiss of Jena and wholly dominated and controlled by it (R. 88–89, 214–215).

The first agreement was entered into April 28, 1921. By paragraph 3 thereof, Bausch & Lomb "obligate themselves not to sell, directly or indirectly, military instruments *to countries* outside of the United States of America, and vice versa. Carl Zeiss obligate themselves not to sell such instruments, directly or indirectly, *to the United States* unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution" (R. 95, 221). [Italics supplied.] By paragraph 2 of the agreement, Bausch & Lomb agreed, allegedly in consideration of Zeiss' obligations under paragraph 3, that on every piece of military optical equipment which it sold to the Government of the United States during the succeeding 25 years, it would pay Zeiss a royalty comprising a percentage of the gross sales prices, whether or not the equipment was covered in whole or in part by Zeiss patents (R. 95–96, 221–222). And by paragraph 9, the parties agreed to conceal the existence of the contract from third parties and so far as practicable from their own employees (R. 95, 221).

The indictment and complaint next charged that the 1921 agreement was supplemented by agreements of June 27 and October 28, 1925, providing that if either party was requested to bid by governments in the other's territory, the former would make a quotation only upon consent of, and at a price agreed to by, the other party (called

a protective offer (R. 233–234)), containing a mark-up of 20% over the regular price, which was intended to throw the business to the party to whom the territory was allotted, and was to be paid to the other party if the bid were accepted (R. 96, 222).

The last agreement charged in the antitrust indictment and complaint was a "new agreement" signed by Bausch & Lomb on November 26, 1926, and by Zeiss of Jena on December 24, 1926, which purported to conclude "all previous agreements" (R. 241, 242). The 1926 agreement was identical with the 1921 agreement except that it omitted paragraph 9 calling for secrecy, modified paragraph 2 regarding royalty payments, and changed paragraph 3 so as not to indicate on its face the allocation agreement (R. 96–97, 223). Both the indictment and the equity complaint alleged that the change was induced by realization that paragraph 3 of the 1921 agreement, as supplemented in 1925, violated the antitrust laws of the United States, but that notwithstanding the revision, Bausch & Lomb "intended and continued to carry out the terms of paragraphs 3 and 9" of the 1921 agreement as supplemented in 1925 (R. 97, 223).[4]

[4] Paragraph 6 of the 1926 agreement provided: "In the production and sale of nonmilitary articles, both parties will remain in unrestricted competition in the World's markets (including North America and Europe) during the existence of this contract. They shall, however, endeavor to give due consideration to one another's interests as those interests may be disclosed by the joint work in the Military line. Special

The indictment and complaint charged further that from 1921 to within 3 years of the indictment and complaint Zeiss refused to sell military optical equipment to the United States without the consent of Bausch & Lomb, and that since June 27, 1925, Zeiss on various occasions offered to sell military optical equipment for use in the United States with the consent of Bausch & Lomb, at arbitrary, noncompetitive prices agreed to by both parties (R. 97–98, 224). It was charged that as a result of the conspiracy the defendants, among other things, "have exacted arbitrary, artificial, unreasonable and noncompetitive prices from purchasers of military optical instruments, including the Government of the United States" (R. 99, 225–226).

Amended Complaint.—On January 13, 1942, before the return of the order to show cause, petitioners served an amended complaint upon respondents (R. 78–85, 260). This alleged an unlawful conspiracy among Bausch & Lomb, Carl Zeiss, Inc., of New York (described as a wholly owned subsidiary of Carl Zeiss of Jena, Germany), and Carl Zeiss, Jena, Germany,[5] a manufacturer of military optical instruments purchased by the United States Government (R. 79–80), "to

agreements may be made regarding territories on nonmilitary articles. New projects may be placed at each other's disposal under royalty agreements." (R. 240.)

[5] The amended complaint also corrected the statements referred to in n. 2, *supra*, p. 5.

suppress and limit competition between themselves by agreeing" (R. 80–81)—

> (a) to divide the world market for military optical instruments into certain geographical areas, the exclusive territory of Bausch & Lomb to be the United States of America, and the exclusive territory of Zeiss to be the rest of the world;
>
> (b) not to sell directly or indirectly such instruments for use in the area or territory allotted to the other without the prior consent of the other;
>
> (c) in the case of sales made by consent for use in the territory of the other, to fix, maintain, and control arbitrary, artificial and unreasonable prices and terms of sale of such military optical instruments; and that in consideration of the obligations assumed by Zeiss, as aforesaid, Bausch & Lomb agreed, among other things, to pay to Zeiss for a period of twenty-five years from May 1, 1921, a sum of money equal to a percentage of the gross sales price of each military optical instrument sold by Bausch & Lomb to the Government of the United States, the said sum of money to be paid irrespective of whether the piece of military optical equipment so sold was covered in whole or in part by patents owned by Zeiss.

The amended complaint went on to allege that, pursuant to the conspiracy, Bausch & Lomb submitted various bids to the United States Government for military optical equipment during the

period 1921–1940, at prices represented to be normal and competitive prices, but in fact in excess of such prices, and that such bids were accepted by the United States, which contracted for the equipment, in ignorance of the conspiracy and in the belief that the prices were normal and competitive (R. 82). It was further charged that Bausch & Lomb and Zeiss of Jena "by their concerted action" sold and delivered military optical equipment to the United States during 1921–1940, dividing the payments in accordance with their agreements (R. 81–82), and that under the contracts respondent Bausch & Lomb and the individual respondents at various times submitted and obtained payment of claims for payment against the United States, which were fraudulent in that, pursuant to the conspiracy, they included an arbitrary amount added to the normal and competitive prices (R. 83).

Respondent Carl Zeiss, Inc., was charged with participating and aiding the conspiracy, particularly in refusing to sell military optical instruments for sale in the United States (R. 81, 83). Like the original complaint, the amended complaint charged violations of the false claims statute (R. S. 3490–3491), and sought the recovery of double damages in the amount of $40,000,000, plus the statutory penalty of $2,000 for each offense (R. 84–85).

Order to Show Cause of January 14, 1942.—On January 14, 1942, the individual respondents

and respondent Bausch & Lomb obtained orders requiring petitioners to show cause on January 16, 1942, why an order should not be entered (R. 46–47)—

> (2) (a) Determining that the purported amended complaint of the plaintiffs herein * * * is a nullity.
>
> (b) Denying leave to the plaintiffs herein to amend their complaint in accordance with said purported amended complaint.
>
> Or in the event that said motion designated (2) (a) and (b) be denied, and the complaint is amended in accordance with said purported amended complaint,
>
> (3) * * * (b) Dismissing this action and the amended complaint herein as against the said defendants on the ground that the amended complaint fails to state a claim against these defendants upon which relief can be granted.
>
> (c) Granting summary judgment to these defendants upon the ground that the complaint and amended complaint, the affidavits annexed to the order to show cause dated January 6, 1942, and the affidavit hereto annexed show that there is no genuine issue as to any material fact herein and that these defendants are entitled to judgment as against the plaintiffs as a matter of law * * *.[6]

[6] On the same day respondent Carl Zeiss, Inc., obtained a similar order to show cause (R. 57–59) on affidavit of its attorneys (R. 60–63).

The annexed affidavit by counsel for the respondents urged the impropriety of the "purported amended complaint" on various procedural grounds and on the ground that "it so plainly fails to state a cause of action * * * that * * * it must necessarily be denied" (R. 49–51). The affidavit then recited (R. 52):

> Even if the complaint were to be deemed amended (which for the reasons stated would be improper), it is clear that it would have to be dismissed and summary judgment granted to defendants upon the grounds set forth in the order to show cause annexed hereto. Accordingly, that relief is sought in the alternative, *but only in the event that grounds 2 (a) and (b) of this motion are denied.* [Italics supplied.]

On January 15, 1942, petitioners filed two affidavits in "answer to the motion of [respondents] by order to show cause dated January 14, 1942" (R. 64–77). Like respondents' affidavits, these incorporated by reference the antitrust indictment and equity complaint against respondents and the consent decree in the equity suit and, in addition, the two bills of particulars filed by the Attorney General of the United States in connection with the antitrust indictment (R. 64–65). Petitioners' affidavits generally declared that these documents amply supported the ultimate facts and conclusions set forth in the original and amended complaints (R. 64–65) and that the affidavit of the

president of respondent Bausch & Lomb in support of the show-cause order of January 6, 1942, raised issues of fact, giving a version of the matters in question contrary to the allegations of the indictment (R. 68).[7]

Orders of the District Court.—On January 24, 1942, the district court entered an order and judgment dismissing the original complaint and granting summary judgment thereon to respondents (R. 259–262). On the same day, the district court also entered an order declaring "that the proposed amended complaint of the plaintiffs herein is a nullity" and denying petitioners "leave to amend their complaint in accordance with said proposed amended complaint on the ground that the said proposed amended complaint does not state a cause of action" (R. 254–258).

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[7] The bill of particulars addressed to Bausch & Lomb included a letter (Exhibit "U"), dated March 7, 1928, from Bausch & Lomb to Zeiss, referring to an inquiry received by Nedinsco, Zeiss' Dutch subsidiary, from the United States for submarine periscopes, and indicating that Bausch & Lomb consented to a quotation by Zeiss at a price including 10% for Bausch & Lomb (R. 188–192).

Exhibit "V" of the same bill of particulars was a letter of February 25, 1938, from Bausch & Lomb to Zeiss, reading as follows (R. 193):

"In response to your letter in reference, you are free to quote on the Periscopes referred to direct to the Electric Boat Company, inasmuch as we may presume that these Periscopes are not intended for the use of our Government, considering that we have not received such an inquiry from our Navy Department."

The Decision Below.—Petitioners appealed from both the order granting summary judgment and the order declaring the amended complaint a nullity and denying leave to amend. In a *per curiam* opinion (R. 267–269), the court below affirmed the judgment of the district court (R. 263–264, 270). The court below stated that insofar as R. S. 5438 "perpetuates the odious and happily nearly obsolete *qui tam* action, it should be regarded with particular jealousy" (R. 269). The court held that under R. S. 5438 a showing of "fraud * * * in its accepted sense of deceit" (R. 267) was required, and that although it might be assumed that the contract between Bausch & Lomb and Zeiss gave Bausch & Lomb an advantage, this was not a fraud, inasmuch as a bidder for a contract "does not represent that there is an open market, or that his bid is 'normal' or 'reasonable,' or 'competitive' " (R. 268).

The court further held that it was immaterial whether, "taking the pleading as it reads", the district court was in error in ruling that petitioners' amended complaint failed to state a cause of action. The opinion states (R. 269):

> * * * in result it made no difference, for the amended complaint like the original was subject to summary dismissal, and it was mere matter of form whether it was accepted and then dismissed, or refused at the outset. The motion for summary judgment dismissing both was right because it appears

beyond question that the supposed liability arose from the offense for which Bausch & Lomb were indicted and to which they pleaded nolo contendere, and that this in turn rested upon the contracts. No testimony was necessary or indeed relevant to the issues so arising. * * *

SUMMARY OF ARGUMENT

A. The presentation of the claims to the United States pursuant to contracts procured as a result of a conspiracy that one party would not submit bids is a fraud on the United States within the meaning of R. S. 5438. Such a scheme cannot be distinguished from the collusive bidding arrangement considered in *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537. Furthermore, there is no basis for the decision below that fraud as used in R. S. 5438, is as narrow as common-law deceit. Judicial decisions show that "fraud" is used in a variety of senses, many of which are broader than deceit, and many such cases deal with agreements to stifle competitive bidding on public and private projects. In addition, the history of the statute here involved demonstrates that "fraud" was to be broadly construed as including any method of cheating the United States.

B. Even if we assume that "fraud", as used in R. S. 5438, means common-law deceit, we believe that an agreement not to bid violates the statute. One who bids in response to an invitation of the

Government manifests an intention to participate in a system of allocating contracts by competitive bidding. If he has previously, by secret agreement, suppressed competition, his bid creates a false impression upon which he intends the Government to rely, and the concealment of the collusive arrangement obviously induces the Government to enter into the contract at the agreed price. The tort of deceit can be predicated upon such concealment of a material fact.

C. In any event, the plan by which Zeiss was to make "protective offers" not intended to be accepted by the United States but for the purpose of concealing the conspiracy brings the case squarely within the case of *Marcus* v. *Hess*.

ARGUMENT

I

THE PRESENT POSTURE OF THE CASE

In view of the opposing contentions of the petitioners and respondents as to the record upon which this Court's decision must be predicated, we believe that it may be helpful to determine the present posture of the case.

Petitioners served their original complaint on December 26, 1941 (R. 49). On January 6, 1942, respondents filed their order to show cause, and motion (R. 11, 39) accompanied by affidavits, in which they moved both that the complaint be dismissed for failure to state a cause of action and

that summary judgment be granted. On January 13, 1942, petitioners served upon respondents an amended complaint (R. 78); if this was served before the filing of a responsive pleading to the original complaint, petitioners were entitled to amend as a matter of right. F. R. C. P. 15 (a).

On January 14, respondents moved, by way of order to show cause, (1) for an order declaring the amended complaint to be a nullity and denying petitioners leave to amend their complaint; and (2) if such relief was denied and the complaint amended, for an order dismissing the amended complaint for failure to state a cause of action and granting summary judgment on affidavits (R. 46–48, 57–59). An answering affidavit to this motion was filed (R. 64). The affidavits of both sides incorporated by reference as exhibits the pleadings in criminal and civil antitrust suits previously brought by the United States against respondents (R. 86–248).

On January 24, 1942, the district court entered two orders. One granted the first portion of respondents' motion of January 14; it declared the amended complaint to be a nullity and denied petitioners leave to amend "on the ground that the said proposed complaint does not state a cause of action" (R. 258). A separate order in response to the motions of January 6 (R. 259) (before the filing of the amended complaint), was entered granting the motion to dismiss and for

summary judgment with respect to the original complaint (R. 261). Appeals have been taken from both orders (R. 263).

With respect to the motions addressed to the original complaint, the affidavits submitted in connection with the prayer for summary judgment were clearly pertinent. But a decision as to the sufficiency of that complaint is of no consequence if petitioners had a right to file the amended complaint. The circuit court of appeals found it unnecessary to pass upon this point (R. 269), but we think it clear that petitioners had such a right under Rule 15 (a).[8]

The significant decision therefore, is that relating to the amended complaint. As to that, respondents had moved for summary judgment only in the event that the court permitted the amendment to be filed. The district court did not do so, as we have shown. The district court accordingly did not act on the motion for summary judgment with respect to the amended complaint, so that the record upon which the court disposed of that complaint did not properly include the affidavits submitted on that motion but only the complaint itself.

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[8] Rule 15 (a) states "A party may amend his pleading once as matter of course at any time before a responsive pleading is served * * *." Respondent's argument is that the motion to dismiss and for summary judgment addressed to the original complaint was a "responsive pleading" which cut off petitioners' right to amend without leave of court. We believe that this contention is unsound for the reason set forth on p. 12 of petitioners' brief.

Since that was the posture of the record on the motion addressed to the amended complaint in the district court, the same would be true on the appeal from the decision on that motion, both in the circuit court of appeals and in this Court.

If we are correct in our analysis, the record before the circuit court of appeals and this Court in so far as the amended complaint is concerned consists only of the complaint itself, the first portion of respondent's motion of January 14, and the order of the district court refusing to permit the filing of the amendment. Contrary to respondents' contention, the factual record would not encompass the affidavits on the motion for summary judgment.

The circuit court of appeals inferentially conceded that the district court was wrong in holding that the amended complaint "as it reads" failed to state a cause of action (R. 269). Since that determination was all that the appellate court had before it for review with respect to the amended complaint, it would appear that the case should have been remanded to the district court without more at that stage. The circuit court of appeals, however, went ahead and apparently treated the case as if a motion for summary judgment had been addressed to the amended complaint. Its opinion makes reference to the contracts attached as exhibits to the antitrust pleadings, which were in turn attached to the affidavits on the motion for summary judg-

ment. Predicating its conclusion on these facts[9] the court held that there had been no fraud within the meaning of the statute.

This determination and the question whether the amended complaint was sufficient on its face present the important questions in which the Government is interested. We shall accordingly deal in this brief not only with the amended complaint considered alone, but also with that pleading taken with the more precise charges in the antitrust material incorporated in the affidavits—the material upon which the circuit court of appeals based its decision.[10]

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[9] The opinion did not rely on the version of the facts set forth in respondents' affidavits, which were, in vital parts, contraverted by the antitrust pleadings.

[10] Respondents contend that the record with respect to the amended complaint includes the affidavits on the motion for summary judgment and that petitioners' affidavits, not being based upon personal knowledge, are incompetent to traverse the allegations in respondents' affidavits. The indictment, complaint, and bills of particulars in the antitrust cases, which are attached to the affidavits as exhibits, are regarded by respondents as hearsay and therefore inadmissible for purposes of the motion for summary judgment. It is true that such documents would not be admissible at a trial as evidence of the facts stated therein. But we do not concede the correctness of respondents' argument that under Rule 56 of the Federal Rules of Civil Procedure only its affidavits could properly be considered by the trial court on the motion for summary judgment. It would, indeed, be a perversion of the summary judgment rule to hold that self-serving declarations of alleged conspirators can establish the absence of any triable issues of fact in the face of contrary allegations contained in a grand-jury indictment, sufficient for the institution of a criminal prosecution and in fact constituting an

II

RESPONDENTS' AGREEMENTS NOT TO BID AGAINST EACH OTHER CONSTITUTED FRAUD WITHIN THE MEANING OF R. S. 5438 EVEN APART FROM THE PROTECTIVE OFFERS DISCLOSED IN THE ANTITRUST PLEADINGS

The amended complaint alleged that respondents had presented claims to the United States upon contracts procured in the course of a conspiracy between respondents that only Bausch & Lomb would compete for contracts with the United States.[10a] The antitrust material brought forward

affidavit by the grand jurors that there are reasonable grounds to believe the allegations contained therein. Indeed, acceptance of respondents' argument in this regard would always enable fraudulent conspirators to overcome actions under R. S. 5438 by motion for summary judgment where they were the only ones with "personal knowledge" of the incriminating facts. Furthermore, in this case, exhibits "U" and "V" (R. 188–193) to the Government's bill of particulars, incorporated in petitioners' affidavits, would seem to constitute admissions by respondents, admissible in evidence, raising issues of fact *vis a vis* respondents' denial that there had been any allocation of territory since 1926.

[10a] Respondents urge that there is nothing in the record to indicate that competitive bids were ever submitted in connection with the alleged conspiracy. But the amended complaint charged that Bausch & Lomb, pursuant to the conspiracy, submitted bids to the United States for military optical equipment at prices "represented to be * * * competitive," but not competitive in fact, and that the United States accepted such bids in ignorance of the conspiracy and in the belief that the prices were competitive (R. 82). Particularly on demurrer, this would seem a sufficient allegation of the submission of competitive bids, and the court below evidently considered the case in that light. See also note 24, *infra*.

in the affidavits also disclosed that Zeiss agreed to make "protective offers"—spurious bids at a higher figure than the contemplated quotation of Bausch & Lomb. But even considering the amended complaint alone, we submit that it sets out a conspiracy fraudulent within the meaning of R. S. 5438, regardless of whether the conspiracy was implemented by the making of protective offers.

A. R. S. 5438 does not require that a common law case of deceit be made out

Under the lower court's construction that R. S. 5438 uses fraud "in its accepted sense of deceit," the incidence of protective offers in a collusive bidding scheme assumes a wholly unwarranted significance in the determination of the existence of a triable cause of action under the statute. In our view that construction is untenable on practical grounds, finds no adequate justification as a matter of legal principle, and is at odds with the legislative history of the statute in question.[11]

The artificiality of the lower court's thesis is at once apparent in terms of the very distinction which it sought to draw between the situation in the case at bar and that in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537. Although the purpose and effect of the conspiracy would be precisely the same in both cases, no liability would

[11] We believe that even by the rigid standards of common law fraud, the amended complaint was adequate under R. S. 5438. See pp. 30–34, *infra*.

follow if the collusive bidders were sophisticated enough to limit the conspiracy to the selection of one of their number to make the desired bid, avoiding the submission of any "protective" bids, whereas liability would attach if the conspirators were sufficiently careless or unwary to submit one or more graduated bids above the predetermined "low bid." Such a distinction "cannot be sustained unless the court lends its aid to make successful a mere device to evade the statute." Cf. *United States* v. *Trinidad Coal Company,* 137 U. S. 160, 166. In dealing with a very similar situation, this Court declared, in *McMullen* v. *Hoffman,* 174 U. S. 639, 651, "Just how the fraud is to be successfully worked out by the combination, it is not necessary to show. It is enough to see what the natural tendency is."

Nor do we see any adequate justification in terms of legal or judicial precedent for the lower court's summarily stated conclusion that R. S. 5438 uses fraud "in its accepted sense of deceit." The fallacy of this assumption (cf. *Ropner & Co.* v. *Emmons Coal Mining Corp.,* 17 F. (2d) 386, 388 (E. D. Pa.)) is apparent from the fact that fraud is used in case and statute law in a wide variety of senses, of which common law deceit (*Ming* v. *Woolfolk,* 116 U. S. 599, 602–603; see *Pence* v. *United States,* 316 U. S. 332, 338) is only one and seemingly the most restricted. It is used in different and generally broader senses, for example, in equity (*Moore* v. *Crawford,* 130 U. S.

122, 128; *Graffam* v. *Burgess,* 117 U. S. 180, 189, 192); in the Bankruptcy Act (*Ames* v. *Moir,* 138 U. S. 306); and in Section 37 of the Criminal Code (18 U. S. C. § 88). *Haas* v *Henkel,* 216 U. S. 462, 479–480; *Hammerschmidt* v. *United States,* 265 U. S. 182, 188; *Curley* v. *United States,* 130 Fed. 1, 8 (C. C. A. 1), certiorari denied, 195 U. S. 628. The latter statute, of course, deals with frauds against the United States and thus is of particular importance here. See also *United States* v. *Plyler,* 222 U. S. 15. Likewise, the "fraud" condemned by the mail frauds statute is broader than the common law tort of deceit and the ancient crime of false pretenses.[12] Certainly, then, there is no basis for assuming in the abstract that the statute uses "fraud" in any particularized sense.

Moreover, the lower court's application of fraud "in the sense of deceit" withdraws from the statute a type of agreement which the courts have traditionally condemned as fraudulent. Thus, "It is well settled that an agreement between intend-

[12] *United States* v. *Groves,* 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, 314 U. S. 670. See *Bradford* v. *United States,* 129 F. (2d) 274 (C. C. A. 5), certiorari denied, 317 U. S. 683; *Pandolfo* v. *United States,* 128 F. (2d) 917 (C. C. A. 10), certiorari denied, 317 U. S. 651; *Leche* v. *United States,* 118 F. (2d) 246 (C. C. A. 5), certiorari denied, 314 U. S. 617; *Shushan* v. *United States,* 117 F. (2d) 110, 115 (C. C. A. 5), certiorari denied, 315 U. S. 574. See also the briefs for the United States in opposition to petitions for writs of certiorari in *Glover* v. *United States,* 316 U. S. 690, and *McDermott* v. *United States,* certiorari denied, 318 U. S. 765.

ing bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition, is a fraud upon the intending vendor or contractor, and the ensuing sale or contract will be set aside." *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 293 (C. C. A. 6), affirmed, 175 U. S. 221; *Parker* v. *New England Oil Corporation*, 13 F. (2d) 158, 172–174 (D. Mass.); *Woodruff* v. *Berry*, 40 Ark. 251 (1882); *Swan* v. *Chorpenning*, 20 Cal. 182 (1862); *City of Oakland* v. *California Construction Company*, 15 Cal. (2d) 573 (1940); *Finley Method Co.* v. *Standard Asphalt Co.*, 104 Fla. 126 (1932); *Ray & Whitney* v. *Mackin*, 100 Ill. 246 (1881); *Hunter* v. *Pfeiffer*, 108 Ind. 197 (1886); *Whalen* v. *Harrison*, 26 Mont. 316 (1902); *Gulick* v. *Ward*, 10 N. J. L. (5 Halst.) 87 (1828); *Constructors Ass'n of Western Pennsylvania* v. *Seeds*, 142 Pa. Super. 59, 15 A. (2d) 467 (1940). Likewise the courts have long similarly denounced as fraudulent agreements to stifle competitive bidding at public or private auction sales. *Slater* v. *Maxwell*, 6 Wall. 268, 277; *Singer Mfg. Co.* v. *Yarger*, 12 Fed. 487 (C. C. D. Ia.); *Nash* v. *Delinquent Lands*, 111 Ark. 158 (1914); *Fleming's Heirs* v. *Hutchinson*, 36 Ia. 519 (1873); *Lloyd* v. *Malone*, 23 Ill. 43 (1859); *Federal Land Bank of New Orleans* v. *Green*, 11 La. App. 257, 123 So. 463 (1929); *Fulgham* v. *Burnett*, 151 Miss. 111 (1928); *Morris* v. *Wood-*

ward, 25 N. J. Eq. 32 (1874); *Nash* v. *Elizabeth City Hospital Co.,* 180 N. C. 59 (1920); *Whitaker* v. *Bond,* 63 N. C. 290 (1869); *Toole* v. *Johnson,* 61 S. C. 34 (1901); *Lohr* v. *George,* 65 W. Va. 241 (1909).[18] In the light of this judicial characterization of similar practices as fraudulent, there is no basis for the refusal of the court below to hold that such agreements are "fraudulent" within the meaning of R. S. 5438. We can only assume that the lower court was guided to a contrary result by its distaste for "the odious * * * *qui tam* action" (R. 269). But since *Marcus* v. *Hess,* that seems clearly to be a legislative problem.

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[18] American Law Institute, Restatement of Contracts, states the matter this way (Sec. 517):

"A bargain not to bid at an auction or any public competition for a sale or contract, having as its primary object to stifle competition, is illegal.

"*Comment* * * * such a bargain, if made merely for the purpose of preventing competition and reducing the price of what is to be sold, is against public policy because operating as *a fraud* on the party offering it, and therefore illegal." [Italics supplied.]

That secret combinations not to bid have been uniformly regarded as fraudulent is also indicated by the leading secondary authorities. 3 Pomeroy, *Equity Jurisprudence* (5th Ed. 1941) § 934 (d); 5 Williston on Contracts (Rev. Ed. 1936), § 1663; 1 Story, *Equity Jurisprudence* (14th Ed. 1918), § 411; 2 Freeman, *Executions* (3d Ed. 1900), § 297; 3 Cooley, *Taxation* (4th Ed. 1924), § 1425; Black, *Tax Titles* (2d Ed. 1893), § 246; Kleber, *Void Judicial and Execution Sales,* § 360; 3 McQuillin, *Municipal Corporations* (Rev. Ed.), §§ 1326, 1348.

Nor can the lower court's interpretation of the statute be reconciled with its legislative history, which argues for the broadest possible construction. The provisions found in Section 3490–3493, and in Section 5438 of the Revised Statutes were included in an Act passed by Congress on March 2, 1863, entitled "An Act to Prevent and Punish Frauds upon the Government of the United States" (12 Stat. 698). The sponsors and proponents of the bill, in urging its passage, stated that its purpose was to eliminate "frauds and corruptions" practiced upon the United States and to prevent conspiracies formed for the purpose of "defrauding and plundering the Government." Cong. Globe, 37th Cong., 3d Sess., p. 952." A Congressional committee on Government contracts, after spending almost a half year investigating frauds in the procurement of war contracts, published a report and hearings extending over more than 1,600 pages. The report of the committee and the debates in Congress make it

[14] That the fraudulent nature of agreements not to bid was recognized in 1863 is indicated by cases and secondary authorities prior to that time. *Swan* v. *Chorpenning*, 20 Cal. 182 (1862); *Spencer* v. *Champion*, 13 Conn. 10, 18–19 (1838); *Loyd* v. *Malone*, 23 Ill. 43, 48; 74 Am. Dec. 179 (1859; *Troup* v. *Wood*, 4 Johns. Chan. 228 (N. Y. Sup. Ct. 1820); *Smith* v. *Greenlee*, 13 N. C. (2 Dev.) 126, 18 Am. Dec. 564 (1829); *Noyes* v. *Day*, 14 Vt. 384 (1842); and see also Story, *Equity Jurisprudence* (1st Ed. 1849), § 293, and 2 Kent's *Commentaries* (7th Ed. 1851), p. 701.

apparent that "fraud" was considered to include any scheme or artifice whereby the United States was deprived of fair value. H. Rep. No. 2, 37th Cong., 2d. Sess., pp. 36–37, 68, 83, 128; Cong. Globe, 37th Cong., 1st Sess., Appendix, pp. 134–136 (1862); Cong. Globe, 37th Cong., 3d Sess., p. 198.

In this setting it is difficult to accept the lower court's hypothesis that Congress, by using the words "false" or "fictitious" in the disjunctive with the word "fraudulent," intended to restrict the coverage of the statute to cases of common-law deceit. Rather, as the "Senatorial sponsor of this bill broadly asserted * * * its object was to provide protection against those who would 'cheat the United States'"[15] (*United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 544). In short, the indicated construction is that in referring to "fraudulent" claims, the statute means no more than claims infected by a design to cheat the United States, without restriction to any particular kind of cheat. Viewing the statute in its intended focus, there is no room for drawing any distinctions between its application to collusive bidding schemes which involve protective offers and to those which do not. The *form* of the scheme to cheat the United States should not be determinative of the existence of a fraud. Any formalistic definition of what constitutes fraud

[15] Cong. Globe, 37th Cong., 3d Sess., p. 952.

can only tempt man's demonstrated ingenuity in circumventing legal barriers.

We submit that petitioners' amended complaint stated a good cause of action against respondents.

B. *The elements of common law fraud were present*

Even if we accept the view of the court below that R. S. 5438 uses fraud in the sense of common-law deceit, we believe that an agreement not to bid violates the statute.

An agreement by competitors not to bid against each other can have only one object—the stifling of competition as a means of obtaining higher prices than could otherwise have been obtained in the course of competitive bidding. The invalidity of such compacts is based on the common knowledge that "men with these agreements in their hands, and relying upon them for gain, do not act toward the public and third persons as they would without them, under the stimulus of competing opposition." See *Atcheson* v. *Mallon*, 43 N. Y. 147, 150–151 (1870). See also Restatement of Contracts (American Law Institute) § 517, Comment b.

The gist of the common-law action for fraud and deceit "is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within

the knowledge or reach of the plaintiff." *Stewart v. Wyoming Ranche Co.*, 128 U. S. 383, 388; cf. *Tyler* v. *Savage*, 143 U. S. 79, 98–99; *Strong* v. *Repide*, 213 U. S. 419, 431–433; *Equitable Co.* v. *Halsey, Stuart & Co.*, 312 U. S. 410, 424 *et seq.*

The purpose of the United States in seeking bids instead of subjecting itself to the hazards of the market is to secure to the Government the benefits which flow from competition and to enable it to secure the lowest price obtainable. *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 126. The concealed collusive action of prospective bidders [16] has the effect of destroying the conditions under which the United States believes that it is transacting business. Such action, had it been known, would have justified the United States in a refusal to deal (39 Op. A. G. 71, 93), and obviously constitutes the concealment of a material fact.

An invitation for bids necessarily indicates an expectation that there will be free and open competition; and one who bids in response to that invitation in effect represents that his bid is free

[16] With reference to the argument that the bidder abstaining might have done so anyway, the fact that the agreement was considered necessary speaks for itself. Cf. *Thompson* v. *Davies*, 13 Johns. (N. Y. 1816) 112, 115:

"In none of the cases cited was the party bound to bid; but, being at liberty to bid, he suffered himself to be bought off, in a way which might prevent a fair competition. The abstaining from bidding, upon concert, and by agreement, under the promise of a benefit for thus abstaining, is the very evil the law intends to repress."

and open. If by virtue of his own secret agreement to suppress competition, the bid does not possess those qualities, he has concealed a defect in his bid, and thus has created "a false impression covering up the truth" to induce action on the apparent situation—the gravamen of the tort action of deceit.[17] Had the bids in the instant case been accompanied by a representation that Bausch & Lomb had done nothing to detract from the free and competitive nature of the bid, the elements of deceit would have been more obvious; and fraud can rest as easily upon the concealment of a material fact as upon an express denial of such fact. *King* v. *International Lumber Co.*, 156 Minn. 494, 497 (1923).

Consequently, the submission of a bid in answer to an invitation for competitive bids, which the bidder knows he has in fact made noncompetitive and which the bidder realizes is a fact not known to the other party—is as much a misrepresentation to induce action prejudicial to the other as the drawing of a check with the knowledge that there are no funds behind it.[18] Additional analogies are readily found, where silence as to a material fact, which if known may induce action less favorable

[17] Prosser, *Handbook of the Law of Torts* (1941), p. 721; see *Mudsill Min. Co.* v. *Watrous*, 61 Fed. 163, 168 (C. C. A. 6).

[18] *Eastern Trust & Banking Co.* v. *Cunningham*, 103 Me. 455 (1908); *Sieling* v. *Clark*, 18 Misc. 464, 41 N. Y. S. 982 (1896).

to the person concealing the information, is held to constitute actionable fraud.[19]

In short, the concealment by Bausch & Lomb, when it submitted its bids to the United States for military optical equipment, of its agreement with Zeiss that Zeiss would not compete with such bids, was the "suppression of material facts" not within the knowledge of the Government. It is therefore submitted that even upon the lower court's standard of common-law deceit, a contract awarded upon an invitation for bids is fraudulent if obtained as a result of a secret agreement between two competitors that only one would submit bids to the United States. It follows that any claims submitted thereon by respondents were "false or fraudulent" claims within the meaning of R. S. 5438.

III

THE AGREEMENTS NOT TO BID COUPLED WITH THE PROVISIONS FOR PROTECTIVE OFFERS, CONSTITUTED A FRAUD UPON THE UNITED STATES

The court below treated the motion for summary judgment as directed against the amended

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[19] The purchase on credit by an insolvent: *Gillespie* v. *J. C. Piles & Co.*, 178 Fed. 886, 891 (C. C. A. 8); *In re Meiselman*, 105 F. (2d) 995, 998 (C. C. A. 2); *Baldwin* v. *Childs*, 249 N. Y. 212 (1928); see *Evans* v. *United States*, 153 U. S. 584, 592; *Donaldson* v. *Farwell*, 93 U. S. 631.

Compare the quasi-contractual right to recover the reasonable value of charitable services against one who sought them while concealing the fact that he was a man of means. *In re Agnew's Will*, 132 Misc. 466, 230 N. Y. S. 519 (1928); see (1929) 29 Col. L. Rev. 95; (1929) 42 Harv. L. Rev. 283.

complaint, and looked to the antitrust pleadings attached to the affidavits for the uncontraverted facts upon which it predicated its conclusion. If the record is so viewed the respondents are shown to have supplemented their agreement not to bid against each other with a plan for the making of "protective offers" where the former would not be adequate. If this fact is considered, the distinction between the present case and *Marcus* v. *Hess* upon which the court below relied completely vanishes.

A. The "protective offer" feature of the conspiracy establishes fraud under R. S. 5438

Read in the light of the antitrust indictment, which, together with its actual bills of particular, constituted in effect a bill of particulars in the case at bar, the amended complaint charged the concoction and execution of substantially the same kind of collusive bidding conspiracy which was condemned recently in *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, and long ago in *McMullen* v. *Hoffman,* 174 U. S. 639. Contrary to the assumption made by the court below, the conspiracy charged did not stop short with an arrangement that respondent Bausch & Lomb would not compete for sales to countries outside the United States and that Zeiss would not compete for sales to the United States. Rather, the charge was that the conspiracy, notwithstanding the 1926 agreement, contemplated in addition that, "In the case of inquiries received by Bausch &

Lomb from authorities outside the United States of America, by Carl Zeiss from the *authorities of the United States,* one party informs the other and is obligated to make the protective offer named by the other party"[20] such protective offer to contain a markup of up to 20% "over the normal price," designed to throw the business to the other party, and to be paid to the other party if the protective offer was accepted (R. 96–97, 154).

The amended complaint and the incorporated antitrust material further alleged that since 1921, Zeiss refused to sell military optical equipment to the United States without Bausch & Lomb's consent; that on various occasions since 1925, Zeiss offered to sell such equipment for use in the United States with the consent of Bausch & Lomb at "arbitrary, artificial, unreasonable and noncompetitive prices agreed upon by Bausch & Lomb and Zeiss" (R. 98);[21] and that pursuant to the conspiracy, respondents obtained contracts at, and exacted payment of, such noncompetitive prices from the Government of the United States (R. 99).

Clearly, the conspiracy thus charged is indistinguishable in substance from that denounced in

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[20] R. 154. [Italics supplied.]

[21] The bill of particulars addressed to Bausch & Lomb in connection with the indictment contains at least two documents, exhibits "U" and "V," tending to corroborate this charge and the charge that the 1926 agreement was merely one of form and not of substance. See R. 188–192, 193. See p. 14, note 7, *supra.*

United States ex rel. Marcus v. *Hess*, 317 U. S. 537. The collusive bidding arrangement in the *Hess* case was aimed, at least in the first instance, at the municipality constructing the PWA project; the conspiracy here, dealing as it did with military instruments, was even more clearly directed against the United States, and this is made doubly clear by the express reference in the 1925 agreement to the submission of protective offers where inquiries were received from the "authorities of the United States" (R. 154). At least one obvious purpose of the scheme was to obtain more money from the United States for the conspirators' equipment than would have been received if they had remained in honest competition.[22] And the protective offers here were designed with the same motive as the collusive bids in the *Hess* case.[23] In short, the conspiracy here was infected with the very kind of fraud found in the *Hess* case, and "did not spend itself with the execution of the contract. * * * The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded." *United States ex rel. Marcus*

[22] Whether this was the paramount object of the conspiracy is not material. Cf. *Claflin* v. *Commonwealth Insurance Co.*, 110 U. S. 81, 96–97.

[23] Any protective offers made by Zeiss are, of course, equally chargeable to its co-conspirators. Cf. *Lincoln* v. *Claflin*, 7 Wall. 132, 138.

v. *Hess*, 317 U. S. 537, at 543–544;[24] see also *McMullen* v. *Hoffman*, 174 U. S. 639, 652–653.

B. *The "protective offer" feature of the conspiracy establishes fraud even under the lower court's construction of R. S. 5438*

Holding that R. S. 5438 uses fraud "in its accepted sense of deceit," the lower court distinguished the facts in *United States ex rel, Marcus* v. *Hess*, 317 U. S. 537, then in an intermediate stage (137 F. (2d) 233 (C. C. A. 3)), on the ground that the collusive bidders, in addition to the predetermined low bid, put in other and higher bids. The court below stated (R. 268):

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[24] Respondents' attempt to distinguish the *Hess* case on the ground that the record here does not show that they obtained any contracts pursuant to competitive bidding is pointless. We believe the amended complaint sufficiently alleged that competitive bids were involved (see note, 10a, *supra*) and surely the Government is equally victimized whether the collusion is effected in relation to purchases made pursuant to public competitive bidding, or to purchases made by negotiations in which quotations are requested from selected suppliers. In fact, collusive suppression of competition adversely affects the United States even where only one bid is solicited.

Indeed, the legislative history of R. S. 5438 reveals that one of the principal factors which gave rise to the statute was the fear that the Government was particularly exposed to fraud because in the exigencies of war its purchases were being made without the benefit of competitive bidding, so that sellers were not subject to the pressure of competition. See Cong. Globe, 37th Cong., 1st Sess., p. 405; Cong. Globe, 37th Cong., 2d Sess., pp. 116, 711–712, 1054.

In any event, there is nothing to suggest that respondents did not mean their agreement to apply to contracts let by the United States through public competitive bidding.

> To put in such bids was a deceit, for the bidders intended that the bids should not be accepted, although by the act of bidding they represented that they hoped to succeed.

Even assuming, *arguendo,* that R. S. 5438 uses fraud in the sense of common-law deceit, the protective offer provisions of respondents' scheme would bring the case within "deceit" as thus defined by the court below. The court necessarily overlooked or ignored the "protective offer" feature of respondents' conspiracy, in distinguishing the *Hess* case. The prime purpose of the protective offers was to throw the contract to the other party, if possible (R. 96). Taking this feature into account, the conspiracy here is both on all fours with that in the *Hess* case and meets the lower court's requirement of deceit.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision of the court below should be reversed.

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PETITION FOR RE-HEARING

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562558—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 21

UNITED STATES OF AMERICA EX REL. MURRAY BRENSILBER AND EMANUEL THEBNER, AND MURRAY BRENSILBER AND EMANUEL THEBNER, ON THEIR OWN BEHALF, PETITIONERS

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH, AND THEODORE B. DRESCHER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING BY THE UNITED STATES

The Solicitor General on behalf of the United States of America respectfully petitions the Court to grant a rehearing in this case.

This petition is submitted by the Government on its own behalf as the real party in interest and as the party aggrieved. The Government is not only interested to the extent of one-half the recovery herein, but, if legislation now pending in

Congress is passed, it may be permitted to take over the instant action and maintain it on its own behalf.[1] In addition, the Government is interested in several other actions now pending in the lower courts on which the decision herein has direct bearing.[2]

By this petition the Government seeks primarily to have this Court review one aspect of the case which, although raised in the pleadings and passed on *sub silentio* in the decision below, was not directly called to this Court's attention on the original argument. This phase of the case in-

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[1] H. R. 1203. In conference, 78th Cong., 1st Session.

[2] As of September 28, 1943, records of the Department of Justice show that at least thirty-seven complaints had been filed by *qui tam* plaintiffs and at least sixty-four complaints had been filed by the United States on its own behalf under the False Claims statute. The damages sought by the *qui tam* plaintiffs, exclusive of penalties, total approximately $240,000,000 in 22 of these suits. The amount of damages sought in the remaining *qui tam* suits is not specifically known but is believed to be very high. The damages sought in most of the suits brought by the United States is not presently known but is likewise estimated at several hundred million dollars. Further, suits under the False Claims statute are being filed by the United States currently.

In many of these cases, while the United States has been defrauded, it cannot be said that the fraud was perpetrated by means of common law deceit in the "accepted sense" of that word, as the Circuit Court of Appeals suggested was necessary under the False Claims statute. These cases involve different types of frauds, including the bribery of Government officials in order to secure contracts, the sale to the Government of defective material, and the faking and falsification of tests in connection with the sale of material, as well as cases involving "common law deceit."

volves several hundred thousands of dollars which the Government should recover. It raises the same important issue of law as to the meaning of the False Claims statute which was presented on the merits by the petition for certiorari, without, we believe, being subject to the points made by respondents as to the inadequacy of petitioners' allegations and affidavits.

It is submitted that the petition should be granted for the following reasons:

(1) The record shows (at least sufficiently to present a triable issue of fact) the existence of an unlawful conspiracy between Bausch & Lomb and Carl Zeiss of Jena from 1921 to 1940[3] whereby the latter agreed not to compete with the former in the sale of military optical instruments to the United States and whereby Bausch & Lomb agreed to pay and did pay to Carl Zeiss of Jena, the parent of Carl Zeiss, Inc., a percentage of the sale price of *all* military optical instruments sold by it to the United States whether or not such instruments were covered in whole or in part by patents owned by Zeiss. This percentage was included in the price paid by the United States on instruments sold to it by Bausch & Lomb and is specifically identified in the record. (R. 143–144.) Whatever may be said of petitioners' case as a whole, the facts on this point are not in substan-

[3] Carl Zeiss, Inc., as a wholly owned subsidiary of Carl Zeiss of Jena, participated in this unlawful conspiracy from 1925, the date of its incorporation (R. 200).

tial dispute, and we do not believe that respondents' arguments as to the deficiency of petitioners' proof generally can be availed of in this connection.

This feature of the conspiracy was not called to the Court's attention on the original argument. It should be considered on reargument since it constitutes a clear case coming within the terms of the False Claims statute (31 U. S. C., Secs. 231–234).

(2) The respondents contended that summary judgment should be granted because the relators, the *qui tam* plaintiffs, failed to bring forth proof to establish the existence of "protective offers," or the continuance of the 1921 agreement beyond 1926. If the judgment was affirmed on this ground, it should be without prejudice to any action by the Government on its own behalf, since the Government should be permitted to submit proof to establish these facts.

STATEMENT OF FACTS

Since reargument is asked because the pertinency of certain material facts was not called to the Court's attention, it is necessary to make a very brief restatement of some of the facts involved.

Material facts which are undisputed are as follows:

(1) Prior to 1921 Bausch & Lomb and Carl Zeiss of Jena (hereinafter called "Zeiss") com-

peted both in the United States and elsewhere in the sale of both military and non-military optical instruments (R. 198).

(2) On April 28, 1921, Zeiss and Bausch & Lomb entered into a twenty-year contract whereby Zeiss agreed not to sell military optical instruments in the United States and Bausch & Lomb agreed not to sell such instruments outside the United States, without the other party's consent (R. 147, 149). In this contract the parties agreed to place at the disposition of each other their patents in the military field (R. 146, 148). Bausch & Lomb agreed to pay to Zeiss a "royalty" amounting to a specified percentage on all sales of military optical instruments made by it *whether or not such instruments were covered in whole or in part by patents owned by Zeiss* (R. 146). Zeiss had the option to acquire patent rights in Bausch & Lomb patents "not resulting from the Zeiss cooperation" at a payment of a four-percent royalty during the life of the patent (R. 148). In the case of non-military articles both parties remained in free competition and royalties on "new projects" in the non-military field were to be the subject of agreements (R. 147–148).

(3) This contract was modified on June 27, 1925, and October 28, 1925, by the inclusion of the so-called "protective offer" features (R. 151–156). The facts as to this feature of the case have been adequately stated in the main briefs, and we

do not urge them herein as additional grounds for reargument.

(4) On November 26 and December 24, 1926, Zeiss and Bausch & Lomb entered into a new contract purporting to supersede the original contract, but covering the same contractual period (R. 157–161). This contract did not continue the "protective offer" feature and did not include an express provision providing for the division of the world market on military optical instruments. However, the contract provided that the parties would remain in unrestricted competition in the *non*-military line (R. 159) and that they would give "due consideration" to one another's interests in the military line (R. 159). The use of Zeiss patents and drawings in the military line by Bausch & Lomb were expressly restricted to the United States, and paragraph 7 provided that Bausch & Lomb should make available to Zeiss patents in the military line which Bausch & Lomb obtained through its own efforts "for the markets outside of the United States" (R. 160). In this contract, in substantially the same words as in the 1921 contract, Bausch & Lomb continued to agree to pay to Zeiss "royalties" on its total sales in the military line (except field glasses) whether or not the instruments sold by Bausch & Lomb were covered in whole or in part by Zeiss patents (R. 158).

(5) Since 1921, Zeiss and its subsidiaries, Carl Zeiss, Inc. (defendant herein) and Nedinsco, have

refused to sell military optical instruments directly to the United States, at least without the consent of Bausch & Lomb (R. 138–140, 106, 203, 224). The defendants admit that "royalty" payments up to seven percent on all military instruments sold by Bausch & Lomb in the United States were paid to Zeiss (R. 28). For the years 1936 to 1938 these payments amounted to $109,988.95, plus taxes (R. 144).

(6) The complaints herein (R. 6, 80–81) and the indictment in the antitrust suit allege that the agreement to divide the world market on military optical instruments was continued beyond 1926 and up to the time of the indictment (R. 105). Examination of respondents' carefully drawn affidavits discloses that they do not affirmatively deny the continuance of the agreement not to compete. The parties seemed to construe the provisions in the agreement of 1926, referred to in paragraph (4), *supra,* as an agreement not to compete in the military line (R. 186–187). On several occasions since 1926 Bausch & Lomb refused to sell military optical instruments outside the United States without the consent of Zeiss (R. 121–138). Since 1926 Zeiss and its subsidiaries on several occasions have refused to sell military optical instruments to the United States without the consent of Bausch & Lomb (R. 44, 138–140, 106, 203, 224).

The normal inference from these facts is that the agreement not to compete continued in force

beyond 1926 and that its effect was to increase the Government's payments to Bausch & Lomb for military optical instruments by at least the amount of the "royalties" payable to Zeiss. At the very least there is a triable issue of fact as to this issue.

ARGUMENT

I

THE AGREEMENT BETWEEN BAUSCH & LOMB TO PAY ZEISS THE "ROYALTIES" OPERATED AS A FRAUD ON THE UNITED STATES WITHIN THE MEANING OF THE FALSE CLAIMS STATUTE

The mere statement of the nature of the agreement entered into between Bausch & Lomb and Zeiss in 1921 and in 1926 shows the existence of a conspiracy, the primary purpose and effect of which is to cheat the United States by causing it to pay excessive prices for military optical instruments. The defendants do not deny that they entered into a contract in 1926 whereby Bausch & Lomb agreed to pay "royalties" on *all* military optical instruments sold by Bausch & Lomb to the United States, whether or not such instruments were covered in whole or in part by patents owned by Zeiss. The defendants do not deny, indeed they affirmatively assert, that since 1926 Carl Zeiss, of Jena, through its wholly owned subsidiaries, refused to sell military optical instruments to the United States directly. The effect of the foregoing agreements is clear. Of neces-

sity, they operated not only to deprive the United States of the advantage of competitive bidding between Bausch & Lomb and Zeiss but to cause the United States to pay Bausch & Lomb excessive amounts for instruments by at least the amount of the so-called "royalties" which Bausch & Lomb paid over to Zeiss.

The word "royalty" as descriptive of these payments is a misnomer.[4] The payments to Zeiss

[4] On the original argument Mr. Justice Frankfurter asked counsel whether the original German texts of the underlying agreements were in the record. It was stated that they were not. The printed record does not contain the original texts of the 1921 or the 1926 agreements but only the translations. The German texts were, however, incorporated by reference in the affidavits in support of the motion. The original texts appeared in the bill of particulars annexed to the indictment referred to in Mr. Eisenhart's affidavit as Exhibits A and E (R. 145, 156). Photostatic copies of the original texts have now been filed with this Court.

These original texts are important and should be considered by this Court. It should be noted that while the translation uses the word "royalty" for the payments to be made by Bausch & Lomb, the original German word is "Abgabe." While untechnically the word "Abgabe" may be translated as a "royalty" the technical German word for royalty would be "lizenzgebuehr" or "lizenz" payment. Indeed, when speaking of the payments Zeiss is to make to Bausch & Lomb, under paragraph 7, for the latter's technical assistance and patents in the military line, the 1926 agreement refers to a "4% ige lizenz." The word "Abgabe" should not have been translated as "royalty" but as implying "an agreement to divide income," which we respectfully submit is the truer meaning of the word "Abgabe" in the context in which it was used in these agreements. This lends additional weight to the government's contention that the 1926 agreement was not in reality an agreement for the payment of "royalties" by Bausch & Lomb to Zeiss but was in effect and intent an

were not restricted to royalties on patents owned by Zeiss (R. 99, 143). On the contrary, under the contracts the specified payments were payable on unpatented instruments, on instruments covered by patents owned by Bausch & Lomb alone, on instruments covered by patents owned by Bausch & Lomb and Zeiss in common, and indeed would seem even to cover instruments developed by Bausch & Lomb and the Navy Bureau of Ordnance.[5] These so-called "royalties" operated as nothing more nor less than the consideration given to Zeiss by Bausch & Lomb to refrain from competing with Bausch & Lomb in the sale of military optical instruments in the United States. The effect of this agreement was the same as if Bausch & Lomb had given to Zeiss a share of the profits on these sales in order to prevent Zeiss from competing. The effect of these payments "would naturally, if not necessarily, result in defrauding the United States by causing to to pay more" (*Crocker* v. *United States*, 240 U. S. 74, 81; *Crawford* v. *United States*, 212 U. S. 183, 192) by at least the amount of the "royalties". This would

agreement for the division of income and the consideration for which Zeiss agreed to refrain from competing with Bausch & Lomb in sales to the United States. At least we believe this can be established on a trial of this action.

[5] In the brief submitted on behalf of respondent Bausch & Lomb it was pointed out that prior to 1921 Bausch & Lomb developed a range finder with the aid of the Navy Bureau of Ordnance (Brief for respondent, pp. 32–33). Even on such instruments Bausch & Lomb would pay a "royalty" to Zeiss under the terms of the 1926 agreement.

be the inference normally to be drawn from the payment itself; certainly, despite respondents' denial (R. 27), these facts raise a triable issue as to the existence of damage to the United States, whether or not they establish a conclusive presumption as to the minimum amount.*

Under this view of the case the conspiracy herein operated as a fraud on the United States within well settled rules. See *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537; *McMullen* v. *Hoffman*, 174 U. S. 639; *Pittsburgh Dredging and Const. Co.* v. *Monongahela & Western Dredging Co.*, 139 Fed. 780 (C. C. W. D. Pa.); *Parker* v. *New England Oil Corp.*, 13 F. (2d) 158, 173–174 (D. Mass.) *Cf. Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555 (C. C. Mass. 1909).

The defendants did not deny the payments of the "royalties." In the brief submitted on behalf of respondents Bausch & Lomb the following statement is made (page 31):

> There is no dispute that the 1926 agreement required payment to Zeiss of certain royalties for the patent and other rights granted to Bausch & Lomb by the 1926 agreement. These were the only payments made to Zeiss by Bausch & Lomb in connection with any transaction with the United States (R. 28). Petitioners do not appear to challenge these royalty payments, nor could they.

* The English Court of Appeal has indicated that at least the amount of an unlawful payment must be presumed to have been passed on to the purchaser. *Hovenden and Sons* v. *Millhoff*, 83 L. T. R. 41 (1900).

The last statement was not entirely accurate, for, while petitioners' briefs did not challenge the "royalty" payments specifically, they were challenged in the complaints and in the supporting documents. The amended complaint specifically makes the payment of these "royalties" a basis of the cause of action (R. 81). The original complaint states that as a result of the conspiracy the defendants sold instruments to the United States at arbitrary, artificial, and unreasonable prices and received payments therefor which they divided among themselves in accordance with the agreements (R. 6). The indictment, which was submitted in connection with the motion for summary judgment on the original complaint, points out that the so-called "royalties" were paid on *all* instruments sold to the United States by Bausch & Lomb, whether or not covered by Zeiss patents (R. 96).

The final decree entered in the equity antitrust suit held that the payment of these "royalties" was unlawful and enjoined the payment of royalties until further order of the Court[7] (R. 246). The Circuit Court of Appeals likewise recognized that the contract between Bausch & Lomb and Zeiss for the division of the market and the payment of these "royalties" was admittedly unlaw-

[7] The Decree, dated July 9, 1940 (R. 246), stated:

"* * * The Agreement between Bausch & Lomb Optical Company and Carl Zeiss, dated at Rochester, November 26, 1926, and at Jena, December 24, 1926, is hereby declared

ful. The court ruled, however, that there had been no fraud on the United States because no representation to the United States had been made by Bausch & Lomb. As indicated herein, whether or not Bausch & Lomb made any representations to the United States, the natural effect of the unlawful agreement would be to inflate the bids by at least the amount of the "royalties" to be paid to Zeiss while Zeiss did not compete. The United States was unquestionably cheated and defrauded to this extent.

To hold that this type of fraud does not come within the False Claims statute is not only contrary to the language and purpose of that act but leads to a result plainly contrary to public policy. Under the holding of this Court in *United States* v. *Cooper Corporation,* 312 U. S. 600, the United States could not recover in a civil action under the Sherman Act the amounts by which it had been damaged by reason of the unlawful conspiracy between Bausch & Lomb and Zeiss. Further,

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unlawful, and the further execution and performance of the same having heretofore become impossible and the said agreement having heretofore been suspended, the defendant Bausch & Lomb Optical Company is enjoined from carrying out any of its provisions, *including the payment of any royalties thereunder until the further order of this Court*; provided, however, that nothing herein contained shall be construed to affect the rights of Bausch & Lomb Optical Company under any patents for the manufacture of military optical instruments." [Italics supplied.]

See *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555 (C. C. Mass. 1909).

the amounts by which the United States has been damaged may not be recoverable in a common law action under the holding of the Circuit Court of Appeals that there is no action on these facts for common law deceit. Thus whatever "royalties" previously collected from the United States were payable by Bausch & Lomb to Zeiss at the time of the equity decree would be retained by Bausch & Lomb. If it is held that these facts do not constitute a false, fraudulent, or fictitious claim under the False Claims statute, the wrongdoer will be permitted to profit by this amount and the United States may be powerless to recover against an admitted wrongdoer the amounts by which it has been damaged. Congress could not have intended such a result.

We respectfully submit that reargument should be granted in order that this Court may reconsider this phase of the case. If deficiencies may have been thought to exist in the record on the aspects of the case presented on original argument, they are not applicable to the facts to which we have called attention.

II

IF SUMMARY JUDGMENT WAS GRANTED AGAINST RELATORS FOR THE FAILURE TO COME FORTH WITH ADMISSIBLE EVIDENCE, THIS JUDGMENT SHOULD BE WITHOUT PREJUDICE TO THE UNITED STATES

On the original argument the respondents urged that summary judgment was properly granted below because the relators had failed to submit ad-

missible evidence to contravene the evidence submitted in the affidavits of Messrs. Eisenhart, Bausch, and Drescher in support of respondents' motions (see Brief on behalf of respondents Bausch & Lomb, pp. 13–22). The respondents further urged that the relators offered no admissible evidence to show the submission of any "protective offers" by Zeiss or its subsidiaries.

In view of the fact that the Government is the party aggrieved, and the real party in interest, if the judgment were affirmed because of the failure of the relators to submit evidence to prove these issues, this affirmance should be without prejudice to the United States. At the very least, the Government should be given the opportunity to bring its own action and prove its own case.[8] It would be contrary to the public interest and to the intent of the False Claims statute to permit a conclusive judgment to be rendered in favor of admitted wrongdoers merely because a *qui tam* plaintiff failed to bring forth any evidence on a motion for summary judgment. Whatever the rule might be if there had been a trial, the Government should not be precluded from bringing forth evidence on

[8] The action herein was commenced prior to the decision of this Court in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537. Since that decision the Government has commenced several actions on its own behalf under the False Claims statute and has brought actions in its own name where there were actions previously commenced by *qui tam* plaintiffs (see *United States* v. *Baker-Lockwood Manufacturing Company, Inc.*, 138 F. (2d) 48 (C. C. A. 8)).

its own behalf solely because there has been a default, albeit unintentional, by a relator on a motion for summary judgment. To hold otherwise might result in serious losses to the Government either through inadequate representation or through collusion.

The affirmance by an evenly divided court may be construed by lower courts as being based on the substantive issue of the construction of the False Claims statute, and with prejudice to an action by the United States. In view of the importance of the issue involved we respectfully urge that rehearing be granted so that if the affirmance was on the ground that the *qui tam* plaintiffs failed to bring forth evidence to substantiate the complaints the Court may clarify the status of a suit by the United States.

CONCLUSION

Wherefore, it is respectfully requested that a rehearing be granted, or, if the Court deny a rehearing, that the judgment be declared to be without prejudice to the interests of the United States.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

I certify that this petition is presented in good faith and not for delay.

CHARLES FAHY,
Solicitor General.

DECEMBER 1943.

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